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No. 87-1172

IN THE
SUPREME COURT OF THE UNITED STATES
October 1987 Term

HARRY BEALE,

vs.

C. WILLIAM O'NEILL, et al.,

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS RICHARD C. GRAHAM AND ISAAC, BRANT, LEDMAN & BECKER'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court should grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit which affirmed the dismissals of petitioner's state-law malpractice/conspiracy claims against respondents, Richard C. Graham and Isaac, Brant, Ledman & Becker, for lack of subject matter jurisdiction?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Petitioner, Harry Beale (Beale).

Respondents, Richard C. Graham (Graham) and Isaac, Brant, Ledman & Becker (Isaac).

Respondent, The Honorable United States District Court Judge Joseph P. Kinneary.

Respondents, C. William O'Neill (O'Neill) and Vorys, Sater, Seymour & Pease (Vorys).

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Petitioner has included in his

appendix the decisions of the United States District Court for the Southern District of Ohio, Eastern Division, which dismissed petitioner's claims for lack of subject matter jurisdiction. The unreported opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the dismissals in the consolidated appeal, is also included in the petitioner's appendix. Finally, the United States Court of Appeals for the Sixth Circuit's denial of the petition for rehearing en banc is also included in the appendix.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1) which provides for the review of decisions by the United States Courts of Appeals by writ of certiorari granted upon the petition of any party to any civil case. The judgment of the Court of

Appeals was entered on October 16, 1987. The petition for a writ of certiorari was filed on January 4, 1988.

APPLICABLE STATUTES

This case involves the two most common federal jurisdictional statutes. "Federal question" jurisdiction is provided for in 28 U.S.C. Section 1331, which provides, as follows:

> The district courts shall have original jurisdictional of all civil actions arising under the constitution, laws, or treaties of the United States.

The "diversity of citizenship" statute, codified in 28 U.S.C. 1332, provides, in pertinent part, as follows:

> (a) the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between-
>
> (1) citizens of different states;
>
> (2) citizens of the state and citizens or subjects of a foreign state;

(3) citizens of different states and in which citizens are subjects of a foreign state are additional parties; and

(4) a foreign state, defined in Section 1603(a) of this title, as plaintiff and citizens of a state or of different states.

* * *

(c) for the purpose of this section and section 1441 of this title, the corporation shall be deemed a citizen of any state by which is has been incorporated and of the state where it has its principal place of business * * *.

STATEMENT OF THE CASE

A. Proceedings Below

This appeal arose out of two pro se actions instituted by petitioner against respondents O'Neill, Vorys, Judge Kinneary, Graham, and Isaac. The actions were commenced on October 7, 1986 (Case No. C-2-86-1201) and October 20, 1986 (Case No. C-2-86-1309) and were filed in the United States District Court for the

Southern District of Ohio, Eastern Division.

The two actions were identical in terms of the named defendants and counts alleged, except that petitioner attempted to bring the first action as a derivative suit on behalf of Applied Coatings International of Delaware (ACI, Delaware) and the second action as an individual claim. The counts against attorney Graham and Isaac in both cases alleged amorphous claims, sounding in conspiracy or legal malpractice, originating from Graham's representation of Omnimax, Inc. in a prior lawsuit. Specificially, petitioner alleged that Graham and Isaac exerted "improper influence upon Judge Kinneary which contributed to the alleged prejudice of Judge Kinneary against Beale and ACI, Delaware."

The United States Attorney, representing Judge Kinneary, filed

motions to dismiss in both actions on the ground of judicial immunity. O'Neill and Vorys filed motions to dismiss, premised upon several grounds, including the lack of subject matter jurisdiction. On February 6, 1987, the district court dismissed Case No. C-2-86-1201. On February 13, 1987, the district court dismissed Case No. C-2-86-1309. Both actions were dismissed in their entirety for lack of federal subject matter jurisdiction. In both cases, the court declined to exercise its power of pendent jurisdiction over petitioner's state claims for malpractice and conspiracy.

On February 13, 1987 and February 23, 1987, petitioner perfected appeals of both dismissals in the United States Court of Appeals for the Sixth Circuit. Upon motion, the separate appeals were consolidated under Case Nos. 87-3142 and 87-3170. On August 14, 1987, the Court

of Appeals affirmed the judgments of the district court. Petitioner's petition for a rehearing en banc was overruled on October 16, 1987.

B. Statement of Facts

Petitioner is an Ohio resident. See complaints and amended complaints, paragraph one.[1] ACI, Delaware, is organized under the laws of Delaware with its principal place of business in Ohio. See complaint, paragraph one, amended complaints, paragraph one. Respondent Graham is an Ohio resident and his law firm, Isaac, has its principal place of business in Ohio.

Petitioner's allegations in his complaints stemmed from respondents Graham and Isaac's involvement in a previous civil action, viz., Applied Coatings International, Inc., et al. v.

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[1] References to petitioner's complaints and amended complaints apply to both pro se actions.

Omnimax, et al., Civil Action No. C-2-84-1979, Southern District of Ohio, Eastern Division. In that action, filed on December 7, 1984, petitioner was represented by attorneys O'Neill and Vorys. Respondent Graham represented one of the defendants, Omnimax, Inc. In that case, petitioner sought to enjoin Omnimax, Inc. (Omnimax) from exercising shareholder rights with respect to shares of Applied Coatings International, Delaware, and from breaching a voting trust agreement pertaining to those disputed shares.

Furthermore, in the Applied Coatings action, petitioner claimed that Omnimax had failed to raise sufficient start-up capital for the formation of an Ohio corporation, ACI-Ohio, in breach of a joint venture agreement previously executed between petitioner and Omnimax. The joint venture agreement had specified

that in return for providing start-up capital, Omnimax would receive forty-nine percent ownership in the newly-formed corporation. After a merger between ACI-Ohio and Red Cliff Energy, Inc. to form ACI, Delaware, the dispute over shareholder rights centered around ownership in ACI-Delaware, with ACI-Ohio eventually becoming a wholly-owned subsidiary of ACI-Delaware. On February 12, 1985, Judge Kinneary, who presided over that particular case, denied the preliminary injunctions sought by petitioner.

On May 17, 1985, Omnimax instituted a motion for a preliminary injunction against petitioner and ACI-Delaware. In that motion, Omnimax sought to enjoin the implementation of certain corporate resolutions of the ACI-Delaware board of directors, including, but not limited to, the issuance of new shares which

allegedly interfered with the proxy solicitation by Omnimax. On October 1, 1985, Judge Kinneary granted the preliminary injunction in favor of Omnimax.[2]

Thereafter, petitioner instituted the instant pro se actions. In Count one of both actions, petitioner alleged legal malpractice on the part of O'Neill and Vorys. In Count two, petitioner alleged that Judge Kinneary had conspired with respondent Graham to attempt to force ACI-Ohio into bankruptcy. In Count three, petitioner maintained that respondent Graham had exerted improper influence over Judge Kinneary and that

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[2] The actual trial in case number C-2-84-1979 occurred in late August, 1987. The jury found that petitioner had committed fraud and breach of fiduciary duty. The district court entered judgment against petitioner in the amount of $164,100. Petitioner has appealed that judgment and the matter is now pending in the Sixth Circuit Court of Appeals in App. No. 87-3987.

Isaac was aware of Graham's actions. Petitioner insinuated that such "improper influence" was exerted because respondent Graham was Judge Kinneary's former judicial clerk.

Petitioner's entire claim was based upon an allegation by Donald S. Moore, an employee of petitioner, who stated in an affidavit that he saw one of Judge Kinneary's law clerks "motion and mouth something to Mr. Richard C. Graham * * *." In addition, petitioner relied upon the same affidavit where Mr. Moore stated that "Mr. Graham did write something and hand it to Mr. Oliver who was asking questions of Dr. Beale." In Count four, petitioner alleged that a "synergestic phenomena" had developed through the improper action of the defendants.

In each action, the complaint and amended complaint plead federal question jurisdiction, pursuant to 28 U.S.C.

Section 1331, with respect to all counts brought against respondent Judge Kinneary. However, with respect to respondents Graham and Isaac, no basis for federal jurisdiction was alleged. Although he was given the opportunity to do so, petitioner never alleged that the conduct of respondents Graham and Isaac raised a federal question.

In both actions, the district courts construed only petitioner's actions against respondent Judge Kinneary as those which presented federal questions. However, the district courts dismissed those claims based upon the doctrine of judicial immunity. Thereafter, the courts, in both cases, determined that the remaining claims were state claims which had no independent basis for invoking federal jurisdiction. The courts declined to exercise pendent jurisdiction over the remaining state law

claims against respondents, due to the absence of a remaining substantial federal claim. Finally, the courts noted that petitioner's claims amounted to impermissible collateral attacks upon decisions rendered by Judge Kinneary in the prior case pending before him, viz., Applied Coatings International, et al. v. Omnimax, et al., Civ. Action No. C-2-84-1979.

SUMMARY OF THE ARGUMENT

The district court properly dismissed both actions against respondents Graham and Isaac for lack of subject matter jurisdiction. The only arguable claims arising under the constitution or laws of the United States were the complaints against respondent Judge Kinneary. However, the district court properly dismissed those claims due to the doctrine of judicial immunity. The remaining claims of either conspiracy

or malpractice against respondents Graham and Isaac provided no independent basis for invoking federal jurisdiction. Thus, the district court properly declined to exercise pendent jurisdiction over those state claims.

Under these circumstances, the Court of Appeals for the Sixth Circuit properly affirmed the judgments of the district court. The appellate court's decision is not in conflict with the decision of another federal court of appeals on the same matter. The appellate court did not decide a federal question in a conflicting manner with a state court of last resort. The federal court of appeals did not decide an important question of federal law which has not been settled by this court. There is no conflict with the decisions of this court. Moreover, this appeal involves no constitutional question.

Consequently, respondents respectfully request that the petition for certiorari be denied.

ARGUMENT AND LAW

I. The Court of Appeals Properly Affirmed the Judgments of the District Courts Which Held That Petitioner Had Failed to Establish Subject Matter Jurisdiction and That Respondents Graham and Isaac Were Entitled to Have the Claims Against Them Dismissed.

The dismissals of petitioner's actions were premised upon three conclusions:

(1) The doctrine of judicial immunity barred the claims asserted against Judge Kinneary;

(2) The claims for malpractice/conspiracy against respondents Graham and Isaac provided no independent basis for invoking federal jurisdiction;

(3) Upon dismissal of the federal claims against Judge Kinneary, the exercise of pendent jurisdiction as to the remaining state law claims was unwarranted.

The only issue before the Court of Appeals for the Sixth Circuit was whether the district court erred in dismissing

the actions. Purcell v. Summers, 126 F. 2d 390 (4th Cir. 1942)(after reversing trial court's dismissal premised upon lack of jurisdiction, reviewing court would not pass on whether plaintiffs had stated a cause of action), cert. den. 317 U.S. 640 (1942); Kasper v. National Electric Products Corp., 165 F. 2d 434 (3d Cir. 1948)(in affirming district court's dismissal of an action for lack of subject matter jurisdiction, appellate court would not consider the question of whether plaintiffs had stated a cause of action).

The Court of Appeals for the Sixth Circuit properly affirmed the dismissals of respondent, Judge Kinneary. It is established law that judges are absolutely immune from suit for actions taken in their judicial capacity unless they are performed in the clear absence of all jurisdiction. Stump v. Sparkman,

435 U.S. 355 (1978). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" Id. at 356-357. The rationale for judicial immunity was set forth in Pierson v. Ray, 386 U.S. 547, 545 (1967):

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His error may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Consequently, the Court of Appeals for the Sixth Circuit properly affirmed the judgments of the district courts

which dismissed the claims against respondent Judge Kinneary. However, the claims against Judge Kinneary were the only ones which arguably raised a federal question. The remaining state law claims against respondents failed to raise a federal question. Thus, the claims against respondents Graham and Isaac were properly subject to dismissal.

II. The Court of Appeals Properly Affirmed the Judgments of the District Courts Which Held That the State Law Claims for Malpractice/Conspiracy Provided No Independent Basis for Invoking Federal Jurisdiction.

Petitioner's pro se actions were properly dismissed for lack of subject matter jurisdiction. The pleadings clearly indicated that no diversity of citizenship existed between petitioner and respondents, Graham and Isaac. Petitioner and ACI, Delaware are citizens of Ohio for purposes of determining diversity jurisdiction pursuant to 28

U.S.C. §1332. As evidenced in the complaint and amended complaint, petitioner is an Ohio resident and ACI, Delaware has its principal place of business in Ohio. Likewise, respondents Graham and Isaac are Ohio citizens for purposes of determining diversity jurisdiction, since Graham is a resident of Ohio and Isaac has its principal place of business in Ohio. Thus, it is clear that the district courts could not retain subject matter jurisdiction over petitioner's actions on the basis of diversity of citizenship.

Furthermore, the district courts properly ruled that petitioner's claims against respondents, Graham and Isaac, were state law claims of malpractice/ conspiracy, and as such, provided no independent basis for invoking federal jurisdiction. There can be no dispute that a cause of action for legal

malpractice, like any other negligence action, is a matter of state law. See Lones v. Detroit, T. & I.R. Co., 398 F. 2d 914 (6th Cir. 1968), cert. den. 313 U.S. 1063 (1969). Furthermore, this allegation failed to state a claim upon which relief could be granted since respondents Graham and Isaac had never entered into an attorney - client relationship with petitioner. According to Ohio law, in order to prevail in a legal malpractice claim, it must be established, among other things, that there was an attorney-client relationship between the parties. Belfer v. Spiegel (1984), 18 Ohio App. 3d 64, 480 N.E. 2d 825.

With respect to the amorphous conspiracy claim, petitioner failed to allege that the conduct of respondents raised a federal question. Petitioner did not allege that this conspiracy

violated his federal constitutional rights. Petitioner's allegations were amorphous, conclusory and uncertain. Mere conclusory allegations are not sufficient to state a claim for damages based on an alleged conspiracy. Smith v. Rose, 760 F. 2d 102 (6th Cir. 1985).

Succinctly stated, no federal claims were ever alleged against respondents, Graham and Isaac. It should be noted that petitioner did refile his state claims of conspiracy and malpractice against respondents, Graham and Isaac, in state court in Ohio. Under these circumstances, the Court of Appeals for the Sixth Circuit properly affirmed the judgments of the district courts which found that the amorphous state law claims of malpractice/conspiracy, brought against respondents Graham and Isaac, had no independent basis for subject matter jurisdiction, pursuant to 28 U.S.C.

§1331.

III. The Court of Appeals for the Sixth Circuit Properly Affirmed the Judgments of the District Courts Which Declined To Exercise Pendent Jurisdiction Over the State Law Claims Against Respondents Graham and Isaac.

"It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). The Sixth Circuit has adopted the position that "district courts have minimal discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial." Province v. Cleveland Press Publishing Co., 787 F. 2d 1047, 1055 (6th Cir. 1986). However, in the absence of a substantial federal claim related to the asserted state claims, federal courts properly decline to exercise pendent jurisdiction over the "pure" state claims. Gibson v. First

Federal Savings & Loan Assoc., 504 F. 2d 826 (6th Cir. 1974). A dismissal of all federal claims before trial requires dismissal of the state claims as well. Kurz v. Michigan, 548 F. 2d 172 (6th Cir. 1977).

Applying these guiding principles to the facts of the instant case, it cannot be said that the district courts abused their discretion in declining to assert pendent jurisdiction over the purely state law claims brought against respondents, Graham and Isaac. Under these circumstances, the Court of Appeals for the Sixth Circuit properly affirmed the judgments of the district courts. Without the existence of a substantial federal claim, the district courts simply did not have jurisdiction to entertain petitioner's claims.

CONCLUSION

The Court of Appeals for the Sixth

Circuit did not decide a federal question in a conflicting manner with a state court of last resort. The Sixth Circuit Court of Appeals did not decide an important question of federal law which has not been settled by this court. This case raises no conflicts with the prior decisions of this court. Moreover, this petition for certiorari involves no constitutional questions.

The district courts properly dismissed both actions against respondents Graham and Isaac for lack of subject matter jurisdiction. The state law claims for malpractice/conspiracy provided no independent basis for invoking federal subject-matter jurisdiction. The district courts properly declined to exercise their power of pendent jurisdiction over those state claims. Under these circumstances, the Court of Appeals for the Sixth Circuit

properly affirmed the judgments of the district courts.

For all of these reasons, respondents Graham and Isaac respectfully request that this court deny the petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon Harry A. Beale, Pro Se, 775 Kaderly Drive, Columbus, Ohio 43228, Duke W. Thomas and Suzanne K. Richards, Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio 43216, James E. Rattan, 85 Marconi Boulevard, Columbus, Ohio 43215 and the Solicitor General, Department of Justice, Washington, D.C. 20530, by ordinary U.S. Mail, postage prepaid this 4 day of February, 1988.

Robert D. Erney

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